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No. 85-159

In the Supreme Court of the United States

October Term, 1984

ALVIN J. REMMENGA and SYLVIA REMMENGA,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

The motion of the Coastal Commission to dismiss or affirm does not discuss the major issues on this appeal. Instead, the Commission:

- ignores the conflict between the opinion below and the opinion of the U.S. Court of Appeals in *Parks v. Watson* (9th Cir. 1983) 716 F 2d 646 (compare JS 10)[1];

[1]The Jurisdictional Statement is cited as "JS."

- insists on living in the past, referring to cases decided 15 and 20 years ago as " . . . relatively recent . . ." (Motion, p 2), thus ignoring important developments in the law since then (compare JS 8-12, 16-18);
- attempts to obscure the importance of the issues at bench by focussing on the specific procedure involved, rather than acknowledging that the core issue is whether government agencies have the power to exact "dedication" of property or payment of money "in lieu" of property as a precondition for an owner to use property;[2]
- sidesteps the anarchy existing in the states (each purporting to be applying the *same* Constitutional protection of property rights) over the extent to which such dedications may be enforced, ranging from the "anything goes" rule of California to the rule in states like New Hampshire and Minnesota where the *same* kind of condition as was approved in this case was likened to "extortion" (*J.E.D. Associates, Inc. v. Town of Atkinson* [NH 1981] 431 A 2d 12, 14) and "grand theft" (*Collis v. City of Bloomington* [Minn 1976] 246 NW 2d 19, 26); and
- generally mis-states the factual and legal background of this case.[3]

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[2]Also ignored is Professor Williams' conclusion that the ability of government agencies to insist on *cash* payment—as at bench—is:

> ". . . one of the few important questions in the whole field of planning law which is as yet unsettled, with the states clearly split down the middle." (5 Williams, *American Land Planning Law* [1985] §156.08 at 360)

[3]By way of illustration, the Commission repeatedly urges that this appeal may be premature, hinting that further proceedings

By refusing to deal with the *real* issues presented by this appeal, and, instead, creating straw issues it would prefer to discuss, the Commission does this Court no service. Rather, the need to so cast its motion admits the bankruptcy of its position and demonstrates the value of this Court setting the case for argument so California may be informed that the Constitutional rights of its property owners cannot be dealt with so cavalierly.

It is easy to see why the Commission doesn't want to talk about the real issue in this case. To do so would expose that California is operating without standards or restraints in the way it treats property owners.

CASE LAW OF THE LAST 20 YEARS DEMONSTRATES THE NEED FOR THIS COURT'S ATTENTION

The Commission's primary point seems to be that this Court need not deal with the issues in this case *now* because, ". . . relatively recent[ly] . . ." (Motion, p 2), this Court dismissed appeals from California and Wisconsin raising generally similar issues.

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may provide compensation. (See Motion, pp 2, 4, 15.) That is false. These proceedings are concluded. If Mr. and Mrs. Remmenga wish to build their home, they *must* pay the $5,000 fee "in lieu" of dedicating coastal access. If, at some future date, some state agency decides to buy access to the coast, those whose property is taken will be paid. But it could hardly be the Remmengas who are far from the coast. And it has nothing to do with this permit proceeding.

A further illustration is the Commission's reliance on Cal. Const. Art. X, §4 as supposed support for the right to coerce coastal access payments from the Remmengas, whose property is a mile inland and separated from the coast by several other ownerships. (See Motion, p 3.) As the Court can see, the quoted Constitutional provision has no application here. It applies only to people ". . . claiming or possesing the *frontage* or *tidal lands* of . . . navigable water. . ." That hardly describes people whose property is a mile inland from the frontage and the tide.

The Commission's analysis ignores the development of the law.

First. Those ". . . relatively recent . . ." decisions were reached in 1966 and 1971.

Second. Neither decision resulted in an opinion from this Court. Indeed, this Court has *never* issued an opinion dealing with the exaction/dedication issues raised by this appeal.

Third. Much has happened in the last 20 years. Among other things, numerous state courts have addressed the issue. As noted at JS 10-12, those decisions—each purporting to enforce the *same* Constitutional protection of property rights—have resulted in a broad diversity of rules.

The right of a property owner in California, who can be forced to "dedicate" property as a condition to obtaining a development permit, even though his proposed development will have no adverse impact on the public, stands in stark contrast to the right of his brother in Illinois. (Compare the case at bench with *Krughoff v. City of Naperville* [Ill App 1976] 354 NE 2d 489.)

The protection accorded in California, where the courts see nothing wrong with imposing substantial financial conditions on the issuance of permits, cannot be reconciled with that given in states like New Hampshire and Wisconsin, which describe such high-handed governmental demands in terms reminiscent of the criminal law. (Compare the case at bench with *J.E.D. Associates, Inc. v. Town of Atkinson* [NH 1981] 431 A 2d 12, 14 ["extortion"] and *Collis v. City of Bloomington* [Minn 1976] 246 NW 2d 19, 26 ["grand theft"].)

Finally. This Court's dismissals of appeals in *Associated Home Builders v. City of Walnut Creek* (1971) 404 US 878 and *Jordan v. Village of Menomenee Falls* (1966) 385 US 4 came at a time when this Court was not reviewing *any* land use decisions.

Since 1971, this Court has recognized the serious Constitutional issues which can be present in cases dealing with restricting rights of ownership. It will be valuable to the economic health of the nation and to the "rule of law" for this Court to address the issues in this case.

WHAT DOES ORAL SEX HAVE TO DO WITH THIS CASE?

The depths to which the Commission feels compelled to sink in order to defend the result reached below is revealed by its heavy reliance on *Paris Adult Theatre I v. Slaton* (1973) 413 US 49. (See Motion, pp 9-11.)

In *Paris Adult Theatre,* this Court dealt with the ability of the Georgia Legislature to enact a statute permitting the state to enjoin exhibition of films dealing graphically with oral and group sex. In *that context,* this Court refused to insist that the legislature engage in heavily detailed fact-finding before concluding that such depictions were not acceptable.

From that springboard, the Commission leaps to the conclusion that *no* legislature need *ever* have more than a general inkling of what it is doing before enacting legislation which impinges on the Constitutional rights of citizens.

Rubbish!

In land use cases, the rule was plainly set forth by the U.S. Court of Appeals in *Parks v. Watson* (9th Cir 1983) 716 F 2d 646, 652:

> "Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred."

By definition, a "rational relationship" must have some basis.

Here, the concern is rational development of the California coastal area in a way which balances the rights of the owners of coastal property and other citizens. Before demanding that a particular group of property owners in a specific area *must* pay $5,000 each before being permitted to build *anything* on their land,[4] there should be *some* rational relationship between the proposed development and the $5,000 "donation."

The only rationalization the Commission was able to concoct was that, at *other* times and in *other* places with *different* types of developments, there have been access problems. So stipulated. So what?

California's coast is 1,000 miles long. It stretches nearly two thirds of the way from Mexico to Canada. It contains virgin redwood forests near the Oregon border and the matchless beauty of the Big Sur area as well as the intensely developed areas of San Francisco, Los Angeles, and San Diego.

That there were problems created in the 1920s in the Los Angeles area because homes were permitted to be built on 20 foot wide lots is not rationally related to extorting a $5,000 fee from people like the Remmengas, whose single family "lot" contains 106 *acres*.

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[4]Please recall, Mr. and Mrs. Remmenga want to put *one* modest 1900 square foot log home on a *106 acre* parcel of land.

Good intentions are irrelevant. So is abstract power. As this Court said in *Kaiser Aetna v. U.S.* (1979) 444 US 164, 174:

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. [Citation.]"[5]

That it may be a good thing to provide additional access to California's coast (see Motion, pp 2, 3, 4, 12) does not mean the Legislature may achieve that goal any way it wills. As in *Kaiser Aetna,* whether the means constitutes a taking " . . . is an entirely separate question." *That* question is the one before this Court. For the Legislature to answer it Constitutionally, there must in fact exist a rational relationship between the proposed use and the imposed exaction.

CONCLUSION

The Commission's motion demonstrates the need for this Court to set this case for argument. It is a paradigmatic illustration of California's attitude toward the rights of those of its citizens who own property. If the state precedent of this case is permitted to stand, property owners in California can fairly be said to have no rights. If cash tribute can be exacted without rational relationship to the land's use causing a need for public service, then any amount can be charged before any use of one's land. Property owners would be better treated by California if they were accused of crime.

By approving virtually any exaction which a governmental agency wishes to impose on one who

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[5]See also cases discussed at JS 16-18.

applies for permission to use his property, the California judiciary has effectively done away with the concept of private property. For, as this Court noted recently:

> "Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner* [1984] ___US___,___, 79 L Ed 2d 343, 349)

If the right to use property is subject to the whim of the Legislature, then the right has disappeared. As this Court enduringly said more than a century ago:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." (*Loan Assn. v. Topeka* [1875] 87 US [20 Wall.] 655, 662)

To assure the primacy of the Constitution, and to restore the courts to their proper role as enforcers of the Constitution, Mr. and Mrs. Remmenga pray that probable jurisdiction be noted.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 2, 1985, I served the within ***Appellants' Reply to Motion To Dismiss or Affirm*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 2, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)